Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

October Term, 1997

RANDY SAYLOR, SR., suing individually and DEBBIE SAYLOR, suing individually and as Next Friend of RANDY SAYLOR, JR., an infant,

Petitioners,

vs.

SAM B. SAYLOR, JIM ROARK, and WILLIAM A. LEE,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Are a state public school teacher and other school officials entitled to claim and receive qualified immunity or exoneration for their acts and conduct under federal civil rights law, if such individuals admit that they knowingly violated the published policy and regulations of the school system by acting or causing the corporal punishment of a pupil in violation of such policy, and if such individuals admit that excessive force was used for such punishment with resulting injury to such pupil?

PARTIES TO THE PROCEEDING

A list of all parties to this proceeding is contained in the caption to this case.

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Appendix C - Opinion and Order of the United States District Court for the Eastern District of Kentucky dated December 29, 1994 ..... C-1

The Petitioners, Randy Saylor, Jr., Randy Saylor and Debbie Saylor respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit will be reported in 118 F.3d 507 (1997), and is reproduced hereto as Appendix A. The opinion of the United States District Court of the Eastern District of Kentucky is not reported but is reproduced hereto as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on the date of July 22, 1997 pursuant to letter from the Clerk of such Court dated as of July 22, 1997 and reproduced hereto as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ...be deprived of life, liberty, or property without due process of law. . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

42 U.S.C. Sec. 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State. . . subject or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privileges, or immunities secured by

the Constitution and laws, shall be liable to the party injuredin an action at law, suit in equity, or other proper proceeding for redress. . ."

STATEMENT OF THE CASE

The Petitioners are Randy Saylor, Jr., and his parents, who filed this suit when he was a juvenile. He is now an adult, but will be referred to herein as "Randy". This case deals with the situation which occurred initially on the date of December 12, 1990, when Randy was a student in the Eighth grade at the Wallins Elementary School. This school was a part of the system of the Harlan County Board of Education. The Respondents are respectively, the principal, vice principal, and the mathematics teacher of the school.

The written opinion and decision of the Sixth Circuit Court of Appeals is appended hereto as Appendix A. This opinion is comprehensive and contains a full discussion of the facts and issues presented in this litiation. It submitted, however, that the following factors should be noted for a full comprehension of the position of the Petitioners in this matter.

There existed a Code of Conduct, or regulations, adopted by the Harlan County Board of Education as of the date of this incident. This Code of Conduct regulated the operations of the school system as to pupils and the staff of each school. This Code of Conduct provided for two forms of punishment if an offense was committed by a pupil in the school. These forms of punishment were either suspension or corporal punishment. The regulations provided that corporal punishment could not be used if the parents did not consent to such and informed the administration of such desire. Suspension was used in lieu of corporal punishment. In this situation, the pupil was dismissed from the school and could not return until the parents met with the school officials and resolved the disciplinary problem. After such, the pupil could

return to the school.

The facts herein are that Randy did engage in a fight in the mathematics classroom on the subject date when the teacher was not in the room. This fight was with another boy due to a prior dispute. The vice-principal came by the classroom and stopped such. He took both boys to his office, and discussed corporal punishment with the youths.

Randy was not paddled initially as he had protested this form of punishment due to the desires of his parents. His parents had withdrawn the consent for corporal punishment due to an incident the prior year. Randy was then suspended formally by the vice principal and was advised to call his mother from the office so that she could come and remove him from the school. Randy could not reach his mother on the phone at first and remained in the office to make the call to his mother.

The mathematics teacher had been in the office and had discussed the paddling situation with Randy. He was aware of the factor that Randy had explained he could not be paddled and that he was suspended by the vice principal. The teacher had left to give a test to the class, and had later returned to the office. He saw Randy there, and attempted to secure his consent to be paddled. Randy contends that he was advised that he could not take the test due to the suspension and that he may fail the Eighth grade. The teacher then left the office. After the class, the teacher returned to the office and again discussed the situation with Randy. At this point, Randy consented to be paddled.

The principal of the school became involved in this matter prior to the third meeting with the teacher and Randy. He had seen Randy in the office and discussed the situation with him, and was advised that Randy did not wish to be paddled due to circumstances. The principal acknowledged in the case that he was aware that Randy's parents had withdrawn consent for corporal punishment due to a prior

incident. He further advised that he believed the pupil could not retract the restrictions of the parents in such matters. The principal later permitted the paddling of Randy, however, when he was asked by the teacher to witness such after Randy consented to the paddling.

Prior to the paddling, the teacher advised Randy and the principal that he was going to bust Randy's butt. The principal admonished the teacher to administer discipline, and offered to do the paddling. The teacher rejected the offer, and gave Randy three blows. At this point, Randy was crying and in obvious distress. The phone rang and the principal answered such and returned. He advised that the paddling was over, but the teacher stated that he had two more blows, and did so. The teacher then left the office and the principal comforted Randy and took him to the restroom to compose himself. Randy later went to take the mathematics test with the teacher, but he could not take it due to his emotional state. He attended the other classes at school and went home on the bus at the end of the school day.

The aftermath of this incident involves the consensus that the teacher used excessive force in administering the punishment. Randy was examined later by a physician. He was not severely injured due to the paddling. His buttocks were substantially bruised and he suffered emotional distress from the incident. In particular, Randy became afraid of the teacher and did not desire to attend his classes any further. He did not return to school immediately after the paddling and after the Christmas vacation. After he did return, Randy first stayed in the office during the mathematics class. His parents later protested this situation in a meeting with the school board in mid-January, 1991. After such, Randy was placed into a remedial mathematics class. He received individual instruction from the teacher in this class for the reminder of the school year. He did graduate from the Eighth grade.

The parents of Randy became involved in this matter after he came home from school, and as they became aware of his condition. His parents first met with the principal of the school the next day. They desired that the teacher be reprimanded and punished in some manner for his acts. This meeting did not resolve their concerns. No action was taken with regard to the teacher. The parents later met with the school board in January, 1991 to correct the factor that Randy was not receiving mathematics instruction, and to have the teacher punished in some manner. This meeting did not result in a solution which was satisfactory to the parents. No action was taken as to the teacher by the board. The teacher is the son of a retired superintendent of the school system. The parents believed that this was a factor in this matter, and concluded that the school board would take no action to satisfy their desires in this matter.

The parents later met with the county officials over the corporal punishment of their son. The parents went to the grand jury and secured an indictment of the teacher over the incident. The father of the teacher then went to Randy's father and requested that he dismiss the indictment. Randy's father was advised that if he did not do so, the school officials would secure negative conduct reports from the teachers of Randy at the school, and place such into his school file. Randy's father refused to dismiss the indictment of the teacher. The vice principal of the school later went to Randy's teachers and secured negative conduct reports and placed such into his file. At a later point, the teacher and the principal went before the grand jury. The grand jury then dismissed the indictment of the teacher. This litigation is the result of these events.

All parties have acknowledged that the force used to perform the corporal punishment as to Randy was excessive. It appears undisputed that Randy did suffer some injury due to this punishment, but the injury was not severe.

The paddling occurred in the presence of the principal of the school. He did not stop such when Randy was in obvious distress after the third blow of the paddle. Moreover, the principal permitted the paddling initially, even though he was aware that the parents did not wish that their son be paddled under the school regulations. No explanation has been provided by any Respondent in this case as to why Randy's rights under the regulations were not observed in this matter. The only reason, which is disputed, is that the teacher contends that Randy's father at some point gave him permission to use corporal punishment in the event Randy misbehaved in his classroom.

This case is otherwise unique in that the paddling occurred after Randy had been disciplined by his suspension from the school. His only reason for being at the school was that his mother could not be reached to remove him from the school. At the initial meeting with the vice principal and the teacher, Randy had been punished under the regulations by a suspension from the school. However, the teacher met with him on two subsequent occasions to secure his consent to be paddled, until Randy did relent and agree to the corporal punishment. As to the principal, he had previously met with Randy and was aware of the situation and that Randy had rejected the paddling. The principal further knew that the parents did not wish Randy to be paddled and that he had been suspended under the school system's Code of Conduct. In the light of these factors, no explanation has been provided by the Respondents as to what legitimate school purpose had been served by the treatment of Randy under the circumstances presented in this case.

EXISTENCE OF JURISDICTION BELOW

This litigation was commenced by a Complaint filed in the United States District Court for the Eastern District of

Kentucky on the date of December 12, 1991. The basis for the Complaint and claims of the Petitioners were the First and Eighth Amendments to the United States Constitution and 42 U.S.C. Sec. 1983. The United States District Court later ruled that the First and Eighth Amendments were not applicable to this case, but did rule that under the pleadings filed herein, the Fifth and Fourteenth Amendments to be enforced under 42 U.S.C. Sec. 1983 were the proper basis for this action. The United States District Court denied the Motion for Summary Judgment for qualified immunity by the Respondents by its opinion and Order dated as of December 29, 1994. This Court did grant the Respondents an interlocutory appeal under 28 U.S.C. Sec. 1291 by its Order dated as of January 18, 1995.

REASONS FOR GRANTING THE WRIT

The Petitioners submit that this Court should examine this case as it involves material questions concerning the rights of school children which exist as matters of federal law. A review of the case decisions on this subject appear to provide differing postures on this topic. In this case, the Sixth Circuit Court of Appeals made a full analysis of this matter and determined that a dismissal of the claims of the Petioners was justified under the facts and law in this interlocutory appeal. In particular, the Court determined that the principal and vice pincipal did not commit any legal violation in this matter as to Randy. In contrast, the Court did review the role of the teacher in this case, and questioned his conduct in this matter. The decision, however, provides that this Respondent is entitled to qualified immunity for his acts as the federal case law at the time did not alert him to the factor that the use of excessive force would violate the rights of the Petitioner in this matter. With due respect to the Court of Appeals, the Petitioners disagree with both conclusions for the reasons herein stated, and urge that

this Court review this decision.

The Petitioners contend that this case involves two violations of the liberty interest of this pupil by the Respondents. The force used by the teacher to conduct the paddling was admittedly excessive and caused injury to Randy. This event was witnessed by the principal who permitted such to occur and continue even though he was aware that Randy was in distress. The Petitioners otherwise note that this treatment of Randy was arbitrary and improper as it was done in violation of the Code of Conduct which had been adopted by the school board of the school system. The corporal punishment was additionally improper as Randy had been suspended from the school under the regulations. As such, the physical punishment was unnecessary and arbitrary and served no educational purpose at the time. As a final matter, the context of the decision of the Court of Appeals infers that a youth has the capacity to waive his rights under school policy guidelines with regard to the forms of punishment provided for misbehavior in the regulations, and if so, the adult actors are entitled to qualified immunity for their conduct. The Petitioners urge that these Respondents did violate the established rights of Randy by their acts and conduct in this incident, and that they are not entitled to qualified immunity under the circumstances presented in this matter.

This Court decided the case of *Ingraham v. Wright, 430 U.S. 651 (1977)* and provided the basic federal law on this subject. In this case, this Court analyzed the subject of corporal punishment in public schools and determined that such was not unlawful per se as a means of maintaining discipline as it was not a cruel and unusual punishment or a violation of the due process rights of pupils. This ruling is, in effect, that corporal punishment is not a cognizable federal law violation if the actions taken by the school officials are reasonable and done for the legitimate purposes of school

administration. This decision does not provide school officials with an unrestricted right to violate the personal security of pupils in schools. Corporal punishment which is done in an unreasonable manner, or for improper motives will be regarded as a substantive due process violation of the pupil under the Fourteenth Amendment.

Petitioners contend herein that the corporal punishment of Randy was unreasonable as it was done with excessive force. This factor has been admitted by the Respondents in the context of this case. The federal case law at the time provided that the use of such force was an unreasonable intrusion of personal security of a pupil under the *Ingraham* case decision. See: *P.B. v. Koch, 96 F. 3d 1298 (9th C.1996); Wood v. Ostrander, 879 F.2d 583 (9th C.1989), cert. den. 498 U.S. 938 (1990); Wise v. Pea Ridge School District, 855 F.2d 560 8th C.1988); Metzger v. Osbeck, 841 F.2d 518 (3rd C.1988); Webb v. McCullough, 828 F.2d 1151 (6th C.1987); Garcia v. Miera, 817 F.2d 650 (10th C.1987), cert. den. 485 U.S.959 (1988); Hall v. Tawney, 621 F.2d 607 (4th C.1980).* In the instant case, the teacher announced his intention to 'bust his butt' and did so in the paddling. The principal observed this situation and did not intervene or stop this treatment. As both Respondentsadmitted that the force used in this incident was excessive, it is submitted that neither of them are entitled to qualified immunity for their conduct in this matter.

The actions of the Respondents herein were arbitrary and unreasonable as there was no need to inflict corporal punishment on Randy as this form of punishment had been selected under the school system's Code of Conduct. Each Respondent admitted that they were aware of the provisions of the code. With the exception of the teacher, it was admitted that the others knew that Randy's parents had rejected corporal punishment for him. The teacher did not express his position in this matter until this litigation began.

In any event, Randy had expressed this position to each Respondent while he was in the school office. He was accordingly suspended initially due to his protests under the provisions of the Code of Conduct. By its terms, this code was adopted, in part, to protect the constitutional and legal rights of the pupils in the school system.

In its decision on this matter, the District Court found that the Code of Conduct of this school system did exist for all purposes at the time of this incident. It further determined that the Respondents knowingly violated the such code by ignoring its restrictions and paddling Randy under the circumstances. As the violations did occur, and as the Petitioner was injured as a result of such, the Fifth and Fourteenth Amendment liberty interest for personal security was violated under the existent law. See: *Franklin v. Auycock, 795 F.2d 1253 (6th C. 1986); Spruyette v. Walters, 753 F.2d 498 (6th C. 1985), cert. den. 477 U.S. 1054 (1986); Kendall v. Board of Ed. of Memphis City, 627 F.2d 1 (6th C.1980).* Under all of the above factors, the Petitioners contend that the Respondents were not entitled to qualified immunity. As this code did exist for some purpose related to the administration of the school system, it is suggested that the provision of this code should be regarded as more than a matter of semantics. The concept of qualified immunity should not be expanded in matters of this nature to exonerate school officials and to permit them to act as they wish. If the pupils and their parents are expected to comply with these regulations, then it appears proper to expect the same from the school officials.

The Petitioners otherwise note that under the Code of Conduct, there was no need to use force in this situation due to the suspension of Randy which was provided in the first meeting with the vice principal and the teacher. This suspension was a disciplinary measure which was provided by the vice principal in the school for the misconduct of

Randy. This form of punishment is provided for in the code, and under such, Randy could not attend classes and was required to leave the school. He was advised to contact his mother by phone and to have her remove him from the school. He was present in the office during this period as he could not reach his mother on the telephone for this purpose. In effect, there was no need to paddle Randy for his conduct as he had been punished by the suspension and the school officials were aware of this factor.

The corporal punishment of Randy, under the above circumstances, was arbitrary and did not serve any disciplinary purpose due to the factor of his suspension. No Respondent has yet explained in the course of this litigation the reason for the corporal punishment in the light of the prior suspension of the Petitioner. The purpose of school discipline had been maintained due to the suspension. In this regard, there was no need for the corporal punishment as a means of enforcing discipline in the school. Under the aforestated authorities, the Petitioners contend that the liberty interest of Randy was violated by the Respondents without any proper reason or motive. The Respondents likewise cannot claim qualified immunity for their conduct under the facts and legal authorities, and they should not have been exonerated for such conduct in this situation.

The final factor of concern relates to the content of the decision of the Court of Appeals and its footnote on the matter concerning the choice that Randy made for the paddling in lieu of the suspension. Randy would not have been present in the office for the subsequent discussions with the teacher to accept the paddling if he could have reached his mother to come and get him from the school after suspension. The situation presented is the factor that he was contacted on more than one occasion to accept the paddling while he remained in the office for the above purpose. As he was technically removed from the school at the time

due to the suspension, there would be no need for any adult educator to discuss this matter with him for any reason. Nevertheless, the teacher met with Randy until he consented to accept the corporal punishment.

This consent had some influence upon the Court of Appeals in its decision. This ruling deals with the premise that Randy made a choice in this matter to accept the corporal punishment in lieu of the suspension. The inference is made that this decision is a waiver of the youth to challenge the conduct of the adults in this situation, and may be a basis for qualified immunity under federal standards. It is submitted that this premise is incorrect if the adult conduct herein can be equated with the choice of a youth for such purposes. If this case can stand as authority for such a posture, this Court should examine such carefully under the concept of qualified immunity.

CONCLUSION

This case is not a challenge to corporal punishment as a means of discipline in public schools. It is contended, however, that qualified immunity should not be used as a means of exoneration of public school officials who have admitted that they acted improperly in a situation. For the reasons herein stated, the Petitioners request that this Petition be granted by this Court.

Respectfully, Submitted,

William D. Stark, Jr.
D. Randall Jewell
By: Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0220P (6th Cir.)
File Name: 97a0220p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDY SAYLOR, SR., suing individually, and DEBBIE SAYLOR, suing individually and as next friend of RANDY SAYLOR, JR., an infant,
Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HARLAN COUNTY, KENTUCKY,
Defendant,

SAM B. SAYLOR, JIM ROARK, and WILLIAM A. LEE,
Defendants-Appellants.

No. 95-5319

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 91-00280--William O. Bertelsman, Chief District Judge.

Argued: January 22, 1996

Decided and Filed: July 22, 1997

Before: CONTIE, NELSON, and BATCHELDER, Circuit Judges.

COUNSEL

ARGUED: Durenda L. Lawson, MILLWARD & JEWELL, Barbourville, Kentucky, for Appellee. Winter R. Huff, LAW OFFICES OF JOHN G. PRATHER, Somerset, Kentucky, for Appellant. **ON BRIEF:** William D. Stark, Jr., Barbourville, Kentucky, for Appellee. Winter R. Huff, LAW OFFICES OF JOHN G. PRATHER, Somerset, Kentucky, for Appellant.

OPINION

DAVID A. NELSON, Circuit Judge. A fourteen-year-old schoolboy, Randy Saylor, Jr., got into a wild fight with a classmate in a public school in Harlan County, Kentucky. Their teacher, Sam Saylor, punished each of them by administering five licks with a paddle. The paddling left the boys with bruised buttocks.

Young Saylor and his parents brought a federal civil rights action alleging, among other things, a violation of substantive due process rights guaranteed by the United States Constitution. The defendants (who include the teacher and the school's principal and assistant principal) ultimately asserted qualified immunity and other defenses in a motion for summary judgment. The district court denied the request for qualified immunity, and this interlocutory appeal followed.

Upon *de novo* review of the record, and treating all genuine issues of fact as having been resolved in favor of the plaintiffs, we conclude that judgment ought to have been entered in favor of the individual defendants on the

basis of qualified immunity. The denial of such immunity will be reversed.

I

Randy Saylor, Jr., was born at Harlan Appalachian Hospital on September 11, 1976. He attended Wallins Elementary School, in Harlan County, from kindergarten through the eighth grade. A younger sister followed him in school.

Resort to corporal punishment was not unknown at Wallins, and a number of the teachers kept paddles in their rooms. Prior to the incident out of which this lawsuit arose, according to the boy's deposition testimony, Randy had been spanked by five different teachers (but never by defendant Saylor) beginning as early as the fourth grade.

When Randy was in the seventh grade, a teacher named Henry Howard paddled him on the back of the legs hard enough to leave bruises. Upset at this, Randy's parents told the principal, defendant William Lee, that henceforth they did not want the school to administer corporal punishment to either of their children. (A "Code of Conduct" for the Harlan County schools provided that parents who objected to corporal punishment could so notify the proper school official upon enrollment of the student.) Mr. Lee subsequently testified at his deposition that he told all the teachers they were not to spank Randy Saylor.

When Randy entered the eighth grade in the fall of 1990, his mother testified, defendant Jim Roark, the assistant principal, was told that the Saylors didn't want their kids whipped in school. Randy's father, similarly, testified that he told both Roark and Lee at the beginning of the school year that he did not want corporal punishment used on his kids at Wallins. Neither Mr. Saylor nor Mrs. Saylor had occasion to convey this message directly to defendant Sam

Saylor,[1] Randy's eighth grade mathematics and history teacher. Sam Saylor had been told by Mr. Lee during the prior school year, however, that Randy's parents did not want him spanked at school.

A few weeks after Randy started the eighth grade, as the testimony of several witnesses established, Sam Saylor telephoned one of Randy's parents to report a problem with the boy's classroom behavior. Randy and his father met with Sam Saylor at the school the following day. In the course of the meeting, Sam Saylor testified, Randy's father told the teacher, *in haec verba*, "that if he [young Randy] gives you any more problem . . . I'm telling you to bust his ass." The father added, Sam Saylor said, that "if that don't do any good . . . you call me and [looking at the boy] I'll take you in front of that class and take my damned belt off and wear your ass out in front of that class." This conversation was reported to Assistant Principal Roark the next day, according to Sam Saylor, and Principal Lee testified that Sam Saylor likewise told him in October that Randy's father had given Sam permission to spank the boy.

Randy Saylor, Sr., testified that when his son misbehaved at home, he (the father) would whip him with a belt or a switch. In response to a general question by counsel for the defendants, however, Mr. Saylor denied ever having told Sam Saylor that it was all right for the latter to administer corporal punishment. The father subsequently volunteered that

> "I have told them people, all of them, if you have any problems with my kids whatsoever in this school, you are to contact me or their mother. If I'm not here that

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[1] Saylor is a common name in Harlan County. Sam Saylor and Randy Saylor, Sr., had known one another all their lives, but they were not aware of any blood relationship. Contrary to speculation offered by the district court at oral argument on the summary judgment motion, there had been no animosity between the two men prior to the paddling. "I thought Sam was a pretty good fellow," Randy Saylor, Sr., testified.

day, I'll miss work the next day to be here. If they need whipped, I'll whip them in front of you."

Young Randy testified that he remembered his father telling Sam Saylor, "Well, if he gives you any more problems, call me and I'll take care of him." The boy was not directly asked if he remembered his father telling the teacher to "bust his ass" if young Randy gave the teacher any more problems — nor was this question posed by counsel for either side during the father's deposition.

On December 12, 1990, as young Randy later told it, Randy was challenged to fight by a classmate, Brian Turner. Randy was big for his age [2] — much bigger than Brian — but this seems to have been no deterrent as far as Brian was concerned.

The trouble started in Mr. Howard's science class, according to Randy's testimony, when Randy felt something on his shoulder. He thought it was a paper wad thrown by Brian Turner, who was sitting a few seats behind him. Randy threw a paper wad at Brian, whereupon the latter, "cussing and carrying on," said he wanted to fight. Randy asked him to name the time, and Brian proposed the next break. (As both boys presumably knew, the Code of Conduct expressly prohibited fighting on school property. In this connection the Code said that "any student who finds himself/herself the victim of harassment should notify a teacher or principal.")

When the bell rang at the end of the period, the boys went on to Mr. Saylor's room for their mathematics class. The class was scheduled to begin at 12:45 p.m., but Mr. Saylor was late in getting back from a sixth grade class he had volunteered to teach several days a week during his

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[2] At a deposition conducted in February of 1993, when Randy was 16 years old, Randy testified that he weighed 240 pounds and stood 6'3" in height. At the time of the fight, he estimated, he had been about 5'10" tall and had weighed 180 pounds.

lunch hour. The sixth grade class was on another floor of the building.[3]

When Randy arrived at Mr. Saylor's room, according to Randy's testimony, Brian proposed getting the fight over with then and there. Randy, unfortunately, agreed. Brian swung first, hitting Randy in the face with his fist hard enough to leave a bruise. The boys fought for a time standing up, and Randy then wrestled Brian to the floor. Suggesting that they needed to stop fighting before Mr. Saylor arrived, Randy let Brian up. The latter came at him again, however, so Randy hit him with a plastic garbage can, scattering garbage everywhere. Then Randy hit Brian in the face with a small plastic water bucket, after which Randy started throwing yardsticks. Brian still wanted to fight, so Randy — "getting mad," in his words — picked up a folding metal chair with which he intended to hit the smaller boy. Other students got the chair away, whereupon Randy picked up a second chair. He testified that he was going at Brian with the chair when the assistant principal, Mr. Roark, came to the door and screamed at the combatants to get to his office. Randy threw the chair down and left the classroom.

When the boys got to the office, Randy testified, Mr. Roark told them that Mr. Saylor was going to be very angry and would expect them to be paddled; that fighting was against the rules; and that the boys had to apologize to one another. Sam Saylor arrived at the office at about this point and was filled in on the fight.

Mr. Saylor may or may not have been angry — Randy testified that "he was kind of angry acting" — but the prediction as to paddling proved accurate. Mr. Saylor told the boys that each of them would get five licks (the

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[3] The plaintiffs' attorneys have suggested that Mr. Saylor might have been late because he was checking on an automatic car wash he owned nearby. The record contains no evidence indicating that Mr. Saylor was not where he said he was, however.

maximum permitted under school policy), and he asked Mr. Roark for the latter's paddle.[4]

In Roark's presence, but with Randy waiting outside the office, Saylor paddled Brian five times. Asked whether they were "easy licks or hard licks," Mr. Roark said they were "good licks," licks that Roark thought were "appropriate." Brian was not required to lower his trousers during or after the punishment, but school officials learned the next day that the boy's buttocks had been bruised.

As for Randy, he initially told Roark and Saylor that he did not want to be paddled.[5] Mr. Saylor responded that the boy would not be allowed back in the classroom unless he took his discipline. Randy again said that he wasn't getting paddled, and Mr. Saylor suggested to him that he speak with his mother on the telephone. Randy attempted to do so, but was unable to reach her.

Mr. Saylor returned to his classroom with Brian, but Mr. Roark continued to talk with Randy, urging him to take the paddling. (Roark testified that although Randy's parents had never told him directly they were lifting their prohibition against Randy's being spanked at school, he had understood from Sam Saylor that the boy's father had lifted the prohibition in October. In speaking with Roark, Lee and Sam Saylor after the fight and before the paddling, Randy himself does not appear to have said a word about his parents' current stance on corporal punishment.)

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[4] According to Principal Lee, Sam Saylor was one of the teachers who did not keep a paddle in his room. Randy testified to the contrary. Be that as it may, Mr. Lee testified without contradiction that "Mr. Saylor probably spanked less than anybody in that school just about . . . ."

[5] It is clear that both boys had the option of not accepting this form of punishment. Principal Lee testified that under school policy the student had to agree before corporal punishment would be administered.

Randy still refused the paddling, so Mr. Roark gave him a standard-form letter of suspension. Where the words "Dates of Suspension" were printed on the form, Roark wrote "Parents to school." Mr. Roark explained at his deposition that this meant Randy was to bring his parents to school and would be suspended unless the problem were resolved with the parents.

Sam Saylor came back to the office at some point and told Randy that the other students in the math class were being given a test; that Randy's absence was unexcused; and that he would receive a zero if he missed the test. Randy testified that he was also told he would have to repeat the eighth grade; Sam Saylor denied having made the latter statement, and Mr. Roark testified that he did not recall anything of the sort having been said.

After returning again to his classroom, Mr. Saylor was summoned to the office to take a phone call. Mr. Roark had left on other business by this time, but Randy was still at the office. On seeing Mr. Saylor, Randy asked if it were too late for him to take the paddling. It wasn't, and Mr. Saylor told Randy to find Mr. Lee or Mr. Roark. (The Code of Conduct provided that "[a] teacher or principal must administer corporal punishment in the presence of a second school official.")

Randy went into Mr. Lee's office and informed the principal that he had decided to take the spanking. After finishing a report he was working on, Mr. Lee went to talk with Mr. Saylor.

When Lee found Saylor, according to the latter's testimony, Saylor asked him "do you want to watch me bust Randy's butt." After correcting his language, Lee inquired if Saylor wanted him (Lee) to take care of it. Saylor's response, according to Lee, was, "no . . . I spanked the other boy and it wouldn't be fair if I don't spank him." Randy testified that Saylor responded, "No, this one's mine . . . ." Randy and both his parents further testified that they did not have any reason to believe that

the spanking was for anything other than fighting in the classroom.

Randy, Mr. Lee and Mr. Saylor went into Mr. Roark's office, where the paddle was again taken out of the desk. Randy testified that it was an older paddle, perhaps two and a half or three inches wide and fourteen or fifteen inches long.[6] Randy kept his trousers on, as Brian had done, and Mr. Saylor paddled him three times before being interrupted by the ringing of a telephone. The third blow was so hard, Randy testified, "it's just like it knocked the breath out of me."

The telephone call was for Mr. Lee, who took it in an adjoining office. Mr. Lee had thought the boy was to receive only three licks, he testified, so when he got back from the call he said something to Randy indicating that the punishment was over. Mr. Saylor, however, explained that there were to be five licks in all. Although Randy said that he didn't want to take any more, according to his testimony, Mr. Saylor then administered the final two licks. The first three had been "fairly hard," in Mr. Lee's opinion, but Lee thought that the last ones were "easy." Mr. Lee further testified that Mr. Saylor's attitude was "normal" at the time of the spanking, that Saylor did not seem upset, and that he did not show any hostility.

Randy had started to cry during the spanking, but he composed himself afterwards and went back to class with Mr. Saylor to take the test. The boy wrote only a little, and then told Mr. Saylor that he had forgotten to study the night before and was still shaken up about the paddling.

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[6] According to Randy, Mr. Roark's paddle was longer and narrower than the newer paddles the teachers were supposed to use. Mr. Roark testified that there were two paddle "molds," one for primary grades and one for junior high; the junior high model was a little larger in size. Paddles were often stolen, it appears, and the particular paddle used on Randy could not be found when the boy's father asked for it the following January.

Mr. Saylor told him he could study at home that evening and take the test the next day.

Randy attended the final class of the day and then rode home on the school bus, reaching home around 3:10 in the afternoon. He told his mother about the spanking and showed her his bottom, which was bruised and swollen. (A photograph taken that evening shows a large red area on the right haunch. A smaller and somewhat fainter bruise is visible on the left side.) Mrs. Saylor took Randy to a hospital emergency room, where he was examined but not treated. In retrospect (a phrase we suppose preferable to the more obvious one) the defendants acknowledge that the force used in administering the paddling was excessive.

Randy's father, when he arrived home after work and saw the bruises, got "real mad," as he later testified. Taking out his 12-gauge shotgun and some shells, he put them in his car and drove to the Wallins school with his family. A baseball game was in progress, and Mr. Saylor asked if anyone had seen Sam Saylor or Bill Lee. No one had, apparently, and neither man could be found at his residence. The Saylors returned home, and Mr. Saylor put up his gun.

Mr. and Mrs. Saylor went to the school the next day and made their displeasure known verbally.[7] Randy's father told Lee, Roark and Sam Saylor that they all knew they were not to use corporal punishment on the boy. The father expressed outrage, moreover, that his son should have been punished for defending himself in a fight — something Randy had been taught at home that he should do.

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[7] At a school board meeting the following month, Mr. Saylor was complimented on the way he and Mrs. Saylor had handled the matter. "I know some other people," an unidentified speaker said, "that'd been so mad they'd have went up there and killed." Others expressed their appreciation as well, one remarking that "it shows some class to come down here and take care of it this way instead of going wild."

Randy's father went before a Harlan County grand jury in January, and the grand jury indicted Sam Saylor on an assault charge. The teacher then requested and received an opportunity to testify before the grand jury himself. After hearing what he had to say, and after hearing from Mr. Lee as well, the grand jury issued a final report recommending that the indictment be quashed. The report said that although Randy's injuries "exceed what would have been reasonable and may very well have been negligently inflicted," the grand jury was now satisfied that the actions of the teacher in disciplining the boy did not amount to criminal conduct. In conformity with the grand jury's recommendation, the indictment was subsequently quashed.

Randy may have been the last student to be paddled at the Wallins school, at least for a while. Mr. Lee testified that he told his staff there would be no more spankings in the school — and the state board of education, according to the newspapers, banned corporal punishment throughout Kentucky for most of the 1991-92 school year.

II

Although the final report of the grand jury had hinted that the Saylors might wish to bring a state law negligence action, they elected instead to seek monetary damages in federal court under 42 U.S.C. § 1983 for what was characterized in the complaint as "a cruel and unusual punishment and the brutal, malicious, and excessive infliction of pain and suffering, and a violation . . . of the substantive due process and equal protection rights of this Plaintiff as such are guaranteed and provided under the Constitution and laws of the United States."[8] Pendent state law claims were also asserted, along with claims for declaratory and injunctive relief.

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[8] The equal protection claim has not been pressed in the briefs we have seen, and we assume it has been abandoned.

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., the defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Citing *Ingraham v. Wright*, 430 U.S. 651 (1977), the district court dismissed the portion of the complaint that alleged a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In all other respects the motion to dismiss was denied.

After discovery proceedings, the defendants moved for summary judgment on the remaining claims. The summary judgment motion — which raised a defense of qualified immunity, among other things — was denied, except as to a First Amendment issue not relevant here. The district court subsequently granted an extension of time to let the individual defendants take an interlocutory appeal from the denial of qualified immunity. The court declined a request for findings that would have let the defendant board of education have an immediate appeal under 28 U.S.C. § 1292(b).

III

As stated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." Although the central issue in many qualified immunity cases is whether a particular constitutional right was "clearly established" at the time of the alleged violation — see, *e.g.*, *Walton v. City of Southfield*, 995 F.2d 1331, 1335-36 (6th Cir. 1993), and the cases there cited — there is a threshold question that sometimes proves dispositive. The threshold question is whether a constitutional or statutory violation has occurred at all. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Purisch v. Tennessee Technological Inst.*, 76 F.3d 1414, 1423 (6th Cir. 1996); *Turner v. Scott*, __ F.3d __, __ (6th Cir. 1997). We turn to this question now.

A

It seems clear to us that the plaintiffs cannot show that either the principal of the school, Mr. Lee, or the assistant principal, Mr. Roark, violated anyone's constitutional rights. The record contains nothing to contradict the evidence that both men had been told by Sam Saylor in October that Randy's father had authorized the school to use corporal punishment — and there is no basis on which a jury could be permitted to find that the principal and assistant principal lacked a good faith belief that the parents' instructions not to paddle Randy had been withdrawn. Against this background, the caselaw leaves no room for doubt that Mr. Lee and Mr. Roark acted within the limits set by the Constitution when they allowed Randy's teacher to paddle him for fighting in the classroom.

As the district court correctly observed in dismissing the plaintiffs' cruel and unusual punishment claim, "[t]he Supreme Court has unequivocally stated that the Eighth Amendment is inapplicable to situations where public school teachers or administrators impose disciplinary corporal punishment. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977)." Because the grant of certiorari in *Ingraham v. Wright* was "limited to the questions of cruel and unusual punishment and procedural due process," *id.* at 659, the Supreme Court had "no occasion [in *Ingraham*] . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause." *Id.* at 679 n.47.[9] The courts of appeals are not of one mind on

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[9] In *Brown v. Johnson*, 710 F. Supp. 183 (E.D. Ky. 1989), a decision by the same district court that decided the case at bar, the court held that school officials did not violate the substantive due process rights of a nine-year-old schoolgirl by paddling her seven times with sufficient force to bruise her buttocks severely. In noting that the bruises did not "shock the conscience" of the court — a test

the substantive due process question, but we know of no circuit where the precedents indicate that the conduct of Principal Lee and Assistant Principal Roark could be held unconstitutional.

The Fifth Circuit, which issued the en banc decision reviewed by the Supreme Court in *Ingraham*, takes the view that where state law provides "adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due." *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1245 (5th Cir. 1984).[10] Corporal punishment of a public school child, as the Fifth Circuit sees it, simply does not "give rise to an independent cause of action to vindicate substantive rights under the due process clause . . . ." *Id.*, citing *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). As the Fifth Circuit said in *Ingraham*,

> "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of

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sometimes used for resolving substantive due process questions — the court repeatedly suggested that in *Ingraham v. Wright* "the Supreme Court found that a severe beating [20 licks with a paddle] and the resulting hematoma [which required the plaintiff to miss 11 days of school] did not shock its conscience." *Brown*, 710 F. Supp. at 186. We believe that the result reached in *Brown* was correct, but the *Brown* court's reading of *Ingraham v. Wright* seems incorrect; the Supreme Court did not address the "conscience shocking" question in *Ingraham*.

[10] Under Kentucky law it is well established that a teacher may be held liable for damages resulting from negligence or deliberate wrongdoing in administering unreasonable or excessive corporal punishment. See *Carr v. Wright*, 423 S.W.2d 521 (Ky. App. 1968). If such punishment is administered maliciously, criminal sanctions may be imposed.

> misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child." *Id.* at 917 (footnote omitted).

See also *Cunningham v. Beavers*, 858 F.2d 269, 271 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (no substantive due process claim was stated where a teacher and school principal punished girls five and six years old for "snickering," the punishment having consisted of five swats with a wooden paddle and the girls' buttocks having been bruised to an extent that led a local child welfare office to state "the situation clearly constituted child abuse").

In *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) — a decision that our unpublished opinions in *Archey v. Hyche*, 1991 WL 100586, at *2 (6th Cir.), and *Darden v. Watkins*, 1988 WL 40083, at *3 (6th Cir.), both characterized as "seminal" — the Fourth Circuit took a somewhat different view. Citing *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.) (three-judge court), *aff'd*, 423 U.S. 907 (1975), where it was held that a parent's constitutional right to control the means of disciplining her child was outweighed by the right of teachers and school officials to employ reasonable corporal punishment in the exercise of their own professional judgment, the Fourth Circuit held that the parents of a child who had been paddled at school against the parents' explicit instructions could not show that their constitutional rights as parents had been violated, even though the paddling was alleged to have been "severe" and not "reasonable." *Hall*, 621 F.2d at 610. The *Hall* court went on to hold, however, that it was error to dismiss, under Rule 12(b)(6), a substantive due process claim asserted by the child herself.

The *Hall* court emphasized that "[i]n the context of disciplinary corporal punishment in the public schools . . . [a] substantive due process claim is quite different than a claim of assault and battery under state tort law." *Id.* at

613. Substantive due process decisions cannot turn on whether ten licks as opposed to five licks would be excessive, for example; substantive due process, the court indicated, is concerned with violations of bodily security of an altogether different order of magnitude. *Id.* Nonetheless, said the court, some tortious school punishments may be "so brutal, demeaning and harmful," so "literally outrageous," as to violate the student's Fourteenth Amendment rights — and in this connection, *Hall* declared,

> "the substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.*

The foregoing passage was quoted by our court with approval in *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). *Webb* is not directly in point here, because it involved a battery that was in no way "disciplinary" — and we stressed the importance of distinguishing the type of battery at issue in *Webb* from the disciplinary blows inflicted as punishment in *Ingraham*. There was no indication in the *Webb* record that "the blows arose other than in anger or from malice."[11] *Id.* at 1158. In the case at bar, by contrast to *Webb*, the punishment was administered in school, before an appropriate witness, with consent (at least initially) from the student, and for a purpose that was unquestionably disciplinary. (As we have seen, all three of the plaintiffs in this case acknowledged at their depositions that they had no reason to believe that the spanking was for anything other than the classroom fight.) We take it, nonetheless, that the substantive due process

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[11] In this respect *Webb* bears some resemblance to *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996).

inquiry prescribed in *Hall* and quoted in *Webb* is the appropriate inquiry to make in the case now before us.

In denying the motion to dismiss the Saylors' substantive due process claim under Rule 12(b)(6), the district court observed that although the complaint alleged reasons for the paddling that may have been constitutionally impermissible, "[t]he physical punishment itself was disciplinary, and does not shock this court's conscience." We agree.

The record developed after denial of the 12(b)(6) motion may well reflect carelessness or an unwise excess of zeal on Sam Saylor's part, but we have no hesitancy in saying that, as a matter of law, the bruises caused by the five licks of the paddle on Randy Saylor's fully clothed buttocks were not "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism . . . that [the paddling] amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Our conclusion on this matter is consistent with the conclusions we reached in *Archey* (no substantive due process violation where a fifth grader suffered severe bruises on being paddled five times for humming in the boys' bathroom) and in *Darden* (no substantive due process violation where a fourth grader who had allegedly failed to do his homework received two or three licks with a paddle and was found by an emergency room physician to have been bruised over a three-to four-inch area of the fleshy part of his left buttock).[12]

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[12] The plaintiffs argue on appeal that the paddling could not have been administered as punishment for the fight, and was thus necessarily impermissible, because Randy had already been punished by being suspended. The school officials viewed suspension as a harsher punishment, however, and assuming that the suspension had really started — a point that is in dispute — it is perfectly clear that the suspension was to be revoked if Randy took the paddling. Randy went back to class after the paddling, it will be recalled, and he would not have done so had he been under suspension.

It does not necessarily follow from what has been said so far that there was no violation of anyone's constitutional rights by Sam Saylor, as opposed to Messrs. Lee and Roark. There is a genuine issue of fact as to whether Randy's father authorized Sam Saylor to administer corporal punishment. If the father did not do so — and we must assume, for present purposes, that he did not — Sam Saylor violated the regulations codified in the Harlan County Schools Code of Conduct by spanking Randy against the parents' express wishes. Although, as discussed above, the spanking *per se* did not constitute a due process violation, it is arguable that the presumed violation of the regulations did. See *Franklin v. Aycock*, 795 F.2d 1253, 1260 (6th Cir. 1986), and *Spruytte v. Walters*, 753 F.2d 498, 506-07 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), prison inmate cases cited by the district court in support of the proposition that the Code of Conduct gave rise to a constitutionally protected liberty interest.[13]

Assuming, for purposes of analysis, that Sam Saylor did violate young Randy's constitutional rights — and perhaps those of his parents as well — we are not persuaded that the rights in question were so clearly established as *constitutional* rights that a reasonable teacher in Mr. Saylor's position would have had to realize that a violation of the Code of Conduct would violate the United States Constitution as well.

For a constitutional right to be clearly established, as this court has repeatedly noted, "the law must be clear in

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[13] *Hewitt v. Helms*, 459 U.S. 460 (1983), on which *Franklin* and *Spruytte* relied in large measure, endorsed a methodology that has now been repudiated in the prison context. See *Sandin v. Conner*, 115 S.Ct. 2293 (1995). Arbitrary corporal punishment in public schools implicates other constitutional considerations, however, see *id.* at 2300-01, and *Sandin* does not rule out the possibility that corporal punishment of a school child may be "arbitrary," in a constitutional sense, if administered in clear violation of school regulations.

regard to the official's particular actions in the particular situation." *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991); *Walton*, 995 F.2d at 1335. "Thus, the particular conduct of the official must fall clearly within the area protected by the constitutional right, such that a reasonable official would have known that his or her conduct violated the constitutional right." *Walton*, 995 F.2d at 1336, citing *Long*, 929 F.2d at 1115. "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" *Lassiter v. Alabama A&M Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) (emphasis in original).

We are aware of no pre-existing law "dictat[ing]" the conclusion that a disciplinary paddling administered by a school teacher in violation of school regulations would *ipso facto* violate federal constitutional law. And this conclusion was squarely rejected in *Woodard*, where the plaintiff, a schoolgirl who was paddled for using abusive language, argued that an assistant principal's violation of the school's parental consent regulation constituted a substantive due process violation. 732 F.2d at 1245. The Fifth Circuit dismissed the girl's argument as simply "semantic." *Id.* at 1246. Notwithstanding the assistant principal's clear violation of the parental consent regulation, the court held, the paddling "presents neither arbitrary and capricious state action nor inhumane and shocking abuse of official power." *Id.*

If the United States Court of Appeals for the Fifth Circuit is unable to equate a regulatory violation with a constitutional violation in this factual context, we are at a loss to see how an eighth-grade school teacher could be expected to do so. If Sam Saylor knew that the parental prohibition against spanking Randy Saylor was still in force, Sam obviously knew that he was violating the Code of Conduct by administering the paddling. He also knew,

no doubt, that he was exposing himself to an action in the Kentucky courts. Perhaps he knew that he was running a risk of more direct action by an irate parent. That Sam Saylor had to have known that he was also violating the United States Constitution, however, is a proposition we cannot accept.

The order of the district court denying qualified immunity is **REVERSED**, and the case is **REMANDED** with instructions to enter judgment in favor of each of the individual defendants.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 564-7000

July 22, 1997

William D. Stark, Jr.
Durenda L. Lawson
Winter R. Huff
Susan C. Lawson

Re: Case No. 95-5319
Randy Saylor, Sr., et. al. v. Board of Education
of Harlan County, Kentucky, et. al.
District Court No. 91-00280

Dear Counsel:

The court today announced its decision in the above-styled case.

A copy of the court's opinion is enclosed and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk
By. Linda K. Martin
Deputy Clerk

Enclosure
swh

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 91-280

RANDY SAYLOR, SR., ET AL — PLAINTIFFS

VS. — OPINION & ORDER

HARLAN COUNTY BOARD OF EDUCATION, ET AL. — DEFENDANTS

I. INTRODUCTION

Plaintiffs, Randy Saylor, Sr. and Debbie Saylor, filed the instant action on behalf of their minor son, Randy Saylor, Jr. (hereafter "Randy"), pursuant to 42 U.S.C. 1983, alleging that Defendants, Samuel Saylor, Jimmy Roark, William Lee and the Harlan County Board of Education, violated rights guaranteed by the first, Eighth and Fourteenth Amendments in imposing discipline on Randy.[1] This matter is before the Court on Defendants' renewed motion for summary judgment. (Doc. No. 64). Oral argument was held on the motion on November 4, 1994, in Lexington, Kentucky. For the reasons set forth below, Defendants' motion (Doc. #64) be, and it is, granted in part and denied in part.

II. FACTUAL BACKGROUND

In December, 1990, Randy was an eighth grade student

1 In an order dated January 6, 1992, Judge Hood dismissed the Eighth Amendment claim on the basis that under Ingraham v. Wright, 430 u.S. 651, 657 (1977), the Eighth Amendment does not apply to disciplinary corporal punishment in the schools.

at Wallins Elementary School in Harlan County. On December 12, 1990, Randy was involved in an altercation with another student while waiting for math class to begin. Jimmy Roark, the school's vice principal, broke up the fight and took both boys to the principal's office. When the teacher, Defendant Saylor, learned of the fight, he went to the principal's office. He informed the boys that they would be paddled for fighting. Randy objected to the punishment. Randy was told that he could either take the paddling or be suspended from school. Randy initially preferred suspension.

Randy was sent to another part of the principal's office and unsuccessfully attempted to call his parents while Saylor paddled the other boy. Randy claims that, thereafter, Saylor, Roark, and Principal William Lee, coerced him into accepting the punishment. Randy claims that he was told that a math test was being given and that he would receive a "0" on the test. In addition, Saylor allegedly stated that there was a possibility that the suspension would result in Randy having to repeat the eighth grade. Randy eventually told Saylor that he would agree to be paddled.

At the time that Randy agreed to accept the punishment, saylor was alone in the principal's office. School board policy required that all paddlings be witnessed by a second school official. Therefore, Saylor sought out Principal Lee to see if Lee would watch him "bust Randy's butt." Subsequently, Saylor struck Randy five times with a wooden paddle. Randy claims that by the third blow, he was in obvious pain and requested that the paddling be discontinued. Although Defendants dispute that Randy requested Saylor to stop after he was struck the third time, it is undisputed that by that time, Randy was in tears or near tears.

The paddling resulted in severe bruising of Randy's buttocks. All parties agree that the blows that were inflicted were hard. Lee acknowledged that bruising was excessive and,

in hindsight, the paddling was beyond the punishment normally inflicted. Randy claims that Saylor acted with an improper motive and maliciously in imposing the discipline. Plaintiffs argue that Saylor struck Randy much harder than necessary in retaliation for Randy objecting to the imposition of punishment. In addition, Plaintiffs argue that Saylor inflicted unnecessary punishment in order to be able to continue an independent business during school hours, a venture he was allegedly pursuing at the time the fight occurred when he should have been in class.

The Code of Conduct for the Harlan County School System permits coproral punishment. Parents are informed, however, that they have the right to object to the use of corporal punishment on their children. Plaintiffs claim that they notified Lee and Roark during the 1989/90 school year, after Randy was bruised from a paddling, that they would no longer consent to corporal punishment. The parties dispute whether the prohibition against the use of corporal punishment was ever lifted by Randy's parents.

The day after the paddling incident, Plaintiffs accompanied Randy to school to complain about the use of corporal punishment and the severeity of the discipline. Plaintiffs informed Lee that they refused to have their son receive classroom instruction from Saylor and requested that alternative arrangements be made. On January 9, 1991, Plaintiffs attended a meeting of the Harlan County Board of Education to protest the discipline and to object to the lack of classroom instruction Randy was receiving. The Board members concluded that the paddling was excessive and that if, as Palintiffs allege, they had voiced their objection to the use of corporal punishment, Defendants had violated school board policies.

III. ANALYSIS

1. Improper Motivation In Inflicting Punishment.

Plaintiffs argue that Saylor acted with malice in inflicting the corporal punishment in this case. In order to establish a substantive due process violation, Plaintiffs must show that the punish-

ment was "arbitrary, capricious, or wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning." Woodard v. Los angeles Indep. Sch. Dist., 732 F.2nd 1243, 1246 (5th Cir. 1984). The inquiry must be whether "the force applied cause injury so severe, was so disproportionate to the need presented, and was inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987).

There is no dispute that Saylor asked Lee if Lee wanted to watch him "bust Randy's butt." There is also no dispute that the blows that were inflicted were hard enough to bring Randy to tears, but that the paddling was not stopped. Lee stated that he had never seen Saylor bring a child to tears during a paddling on any other occasion. Furthermore, all Defendants agree that the bruising that resulted was excessive and that the punishment was greater than normally inflicted. Saylor, in fact, stated that he was shocked when he saw Randy's bruises. The members of the school board considered the paddling excessive. On the basis of the record, there remains an issue of material fact regarding whether Saylor acted with malice and an improper motivate in inflicting corporal punishment. Defendants' motion for summary judgment on this issue is, therefore, denied.

2. The Code of Conduct Gives Rise To A Liberty Interest.

The parties do not dispute the fact that it would be a violation of school board policy to inflict corporal punishment on a student after a parent exercised his right to prohibit such punishment, even if the student consented to the discipline. The issue, therefore, is whether the policy promulgated by the school district gives rise to a liberty interest protected by the Fourteenth Amendment.

A state may create a protected liberty interest through the enactment of statutes, rules, regulations or policies. Franklin v. Aycock, 795 F.2d 1253, 1260 (6th cir. 1986). "[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Spruytte v. Walters, 753 F.2d 498, 507 (6th Cir. 1985), cert. denied, 474 U.S. 1954 (1985) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)). In determining whether a rule or regulation gives rise to a liberty interest, courts focus on the mandatory nature of the language in the rule or regulation at issue. In Washington v. Starke, 855 F.2d 346 (6th Cir. 1988), the court stated: "The mandatory nature of the regulation is the key, as a plaintiff 'must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it.'" Id. at 349 (citation omitted) (emphasis in original).

The corporal punishment policy adopted by the school board was mandatory. The policy withdrew all discretion from school officials in deciding whether to impose corporal punishment once a parent followed appropriate procedures in objecting to the punishment. Thus, assuming that Plaintiffs can establish that they withheld consent, the violation of the policy states a valid claim for a violation of due process.

3. The Individual Defendants Are Not entitled to Qualified Immunity.

Defendants contend that even assuming that Plaintiffs' claims give rise to a cause of action under substantive due process, Defendants are, nonetheless, entitled to qualified immunity. The Court disagrees.

In circumstances in which a plaintiff establishes that a regulation gives rise to a liberty interest, the courts employ the general standard of "clearly established statutory or constitutional rights of which a reasonable person would have known" in determining whether an official is entitled to qualified immunity. Spruytte v. Walters, 753 F.2d at 510 (quoting Harlow v.

Fitzgerald, 457 U.S. 800, 818 (1982).[2] The plaintiff has the burden of demonstrating that any official in the defendant's position would have understood they were under an affirmative duty to refrain from committing the conduct of which the plaintiff complains. Walton v. City of Southfield, 995 F.2d 1331, 1341 (6th Cir. 1993).

At the time of the actions complained of in this case, the law was clearly established that a failure to follow internal rules and regulations could give rise to a substantive due process violation. Washington, 855 F.2d at 349: Franklin, 795 F.2d at 1260; Spruytte, 753 F.2d at 507. Defendants concede that if Plaintiffs did not withdraw their prohibition against use of corporal punishment, Defendants were obligated to refrain from imposing corporal punishment. Thus, a reasonable official would have realized that he should refrain from inflicting corporal punishment and, therefore, Defendants are not entitled to qualified immunity on Plaintiffs' claim that they violated school board policy.[3]

4. The School Board can Be Held Liable For Misconduct of Its Officials.

The school board contends that it is entitled to summary

[2] The precendent in the Sixth Circuit that addresses immunity in light of internal policies or regulations has arisen in the criminal or police brutality contexts. Courts, however, have frequently incorporated police brutality standards into their substantive due process analysis in the corporal punishment context. See, e.g., Webb, 828 F.2d at 1158 (quoting Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980)).

[3] The fact that Roark was not present at the time the punishment was inflicted does not entitle him to immunity. It is undisputed that he encouraged Randy to accept the paddling. Liability can be imposed on a supervisor who, at least implicitly, authorized, approved or knowingly acquiesced in the unconstitutional conduct of a subordinate. Walton, 955 F.2d at 1341; see also Norris v. Davis, 826 F. Supp. 212, 217 (W. D. Ky. 1993) (supervisory officials can be held liable if they encourage or participate in misconduct).

judgment because a municipality or body of local government cannot be held liable for the misconduct of its officials on the basis of the doctrine of respondeat superior. Monell v. New York City Dep't of Social Serv., 436 U.S. 658, 694 (1978). A municipality can, however, be held liable under 1983 if the plaintiff can demonstrate that a policy or custom of the municipality caused the injury. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1162 (1993). To establish a municipal policy, the plaintiff must show: (1) the municipality officially sanctioned or ordered the challenged action; (2) the actor or decisionmaker had final policymaking authority under state law; and (3) the actor or decisionmaker had final policymaker authority in the city's business in question. City of St. Louis v. Praprotnick, 485 U.S. 112, 123 (1988) (citing Pembaur v. Cincinnati, 475 U.S. 469, 482-83 (1986)).

An unconstitutional policy may be "inferred from a single decision taken by the highest officials responsible for setting policy" if the official has authority to make final policy. Praprotnick, 485 U.S. at 123.

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. at 127.

Under the terms of the Harlan County Code of Conduct, parents are to notify the school principal if they object to corporal punishment in order to develop an alternative course

of action in the event that disciplinary problems arise. Further, the Code of Conduct provides that the principal is responsible for ensuring that all due process procedures are followed in cases involving staff and students. The principal is responsible for providing parents with information regarding the School Board's Code of Conduct. According to David Kennedy, a member of the Harlan County School Board, each principal at the schools within the county are the primary policymaking personnel responsible for ensuring that the policies adopted by the Board are carried out.

Under the facts of this case, the principal, William Lee, was the school board's final policymaker with regard to the use of corporal punishment. Lee was present and acquiesced in Saylor's conduct in imposing corporal discipline on Randy. Accordingly, the decisions made by Principal Lee with respect to the imposition of corporal punishment constitute actions of the school board, and his ratification of the punishment is chargeable to the school board because Lee had the final decision in implementing the board's policies. The school board, therefore, is not entitled to summary judgment on Plaintiff's claim for violation of school board policy.

5. Defendants Are Entitled To Summary Judgment On Plaintiffs' First Amendment Claim.

Plaintiffs argue that after the paddling incident, Defendants retaliated against Randy by denying him a proper education because Plaintiffs exercised their First Amendment right in voicing opposition to the imposition of corporal punishment and the severity of the punishment. In order to prevail on the First Amendment claim, Plaintiffs are required to demonstrate that their speech touched on a matter of public concern. Connick v. Myers, 461 U.S. 138, 169 (1983). In the First Amendment context, a distinction must be drawn between personal challenges to the application of a school policy and challenges to procedures in general. DePree v.

University of Kentucky, Nos. 88-5755, 88-5798, 1989 WL 98707, *2 (6th Cir. 1989).

The Court finds that Plaintiffs' complaints to the school board were a personal challenge to the imposition of punishment in this particular case. Plaintiffs do not suggest that they were protesting the corporal punishment policy. To the contrary, Plaintiffs were simply expressing their private concern over the treatment of their son. Thus, Plaintiffs have not carried their burden of demonstrating speech on a matter of public concern and, therefore, Defendants are entitled to summary judgment on this issue.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the motion of Defendants to dismiss Plaintiffs' Fourteenth Amendment claim be, and it is, **denied**;

2. That the individual Defendants are not entitled to qualified immunity;

3. That the school board's motion for summary judgment is **denied**;

4. That Defendants' motion for summary judgment on Plaintiffs' First Amendment claim be, and it is, **granted.**

5. That the individual Defendants shall advise the court, in writing, within **fifteen (15) days** of the date of this order if they are going to take an interlocutory appeal on the denial of qualified immunity. On receipt of such advice, the case shall be held in abeyance pending the outcome of the interlocutory appeal.

This 27th day of December, 1994.

William O. Bertelsman, Chief Judge